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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD H. AUSTIN, *et al.*,

Appellants,

v.

MICHIGAN STATE CHAMBER OF COMMERCE,

Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE,* IN SUPPORT OF APPELLEE

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*, IN SUPPORT OF APPELLEE

The American Civil Liberties Union submits this brief as *amicus curiae* in support of the judgment of the United States Court of Appeals for the Sixth Circuit, holding section 54(1) of the Michigan Campaign Finance Act unconstitutional as applied to the independent expenditures of a non-profit, membership corporation.

Letters from counsel for each of the parties, consenting to the filing of this *amicus* brief, have been filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union, Inc. ("ACLU"), is a non-profit, membership corporation incorporated under the laws of the State of New York, with approximately 250,000 members throughout the United States. For nearly seventy years, the ACLU has been dedicated to upholding and protecting the First Amendment rights of all persons, irrespective of their partisan political interests or affiliations.

In defense of the fundamental First Amendment right of individuals and associations to engage in political expression, the ACLU has been an active participant in litigation involving government regulation of election campaign speech. The New York Civil Liberties Union, an affiliate of the ACLU, was one of the plaintiffs in *Buckley v. Valeo*, 424 U.S. 1 (1976), the landmark challenge to the constitutionality of federal election laws. The ACLU has participated as *amicus curiae* in *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981); *Common Cause v. Schmitt*, 455 U.S. 129 (1982); *Federal Election Commission v. National*

Conservative Political Action Committee, 470 U.S. 840 (1985); *Federal Election Commission v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986); *Meyer v. Grant,* 108 S. Ct. 1886 (1988), and other cases raising issues similar to those presented here.

In addition, the ACLU has represented various groups and individuals, of all ideological persuasions, whose political advocacy has been prohibited, restricted or inhibited by campaign finance laws.[1] Moreover, the ACLU has had to defend itself against the unconstitutional application of campaign finance laws to its non-partisan activities. *See American Civil Liberties Union v. Jennings,* 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom. Staats v. American Civil Liberties Union,* 422 U.S. 1030 (1975); *Buckley v. Valeo,* 519 F.2d 821, 871 (D.C. Cir. 1975) (*en banc*); *In Re ACLU,* Dkt. MUR 1802 (Federal Election Commission, 1984).

The ACLU, like the appellee here, and like thousands of other organizations that engage in political speech, has chosen to operate in corporate form. Laws that prohibit all corporations from engaging in otherwise constitutionally-protected conduct, for no other reason than that they hold corporate charters, threaten the ability of such groups and their members—including the ACLU and its members—to participate fully in the important national debates of our time.

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[1] *See, e.g., Brown v. Socialist Workers '74 Campaign Committee,* 459 U.S. 87 (1982); *United States v. National Committee For Impeachment,* 469 F.2d 1135 (2d Cir. 1972); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45 (2d Cir. 1980) (*en banc*); *Federal Election Commission v. Survival Education Fund, Inc.,* No. 89-Civ-0347 (S.D.N.Y. filed January 17, 1989).

SUMMARY OF ARGUMENT

The Michigan law at issue in this case strikes at the heart of what the First Amendment protects: public discussion about how our Nation shall be governed. The fact that the association wishing to participate in that debate exists in corporate form does not place it outside the protection of the First Amendment, and thus the statute works a direct and substantial abridgment of core constitutional rights. Accordingly, it must be struck down unless the State can demonstrate a *compelling* need for its enforcement.

No such need has been or can be shown. Independent expenditures made for the purpose of purchasing public political speech simply do not amount to a corruption of the political process, and do not present the appearance of such corruption, as this Court has consistently held. Nor are the draconian prohibitions involved here necessary to prevent the flow of business money through non-profit corporations and into political speech, since bookkeeping and reporting requirements, deemed sufficient by Congress and this Court in similar contexts, can serve that purpose adequately.

The statute at issue also does not serve a compelling purpose with respect to the rights of dissenting members or shareholders of corporations, since the law's own provisions and history indicate that this was not its purpose; in any event, governmental suppression of the speech of private entities because of dissent internal to such entities would raise very serious constitutional difficulties of its own. Finally, there is nothing special about the nature of corporations or the source of their income that makes them more legitimately subject to political censorship than other organizations and associations.

The effort to regulate corporate political speech is fraught with unsupportable assumptions and impossible distinctions, and poses a continuing threat to the free speech rights of all. It

should be abandoned as inconsistent with the First Amendment.

ARGUMENT

I. SECTION 54(1) DIRECTLY RESTRICTS SPEECH AT THE CORE OF THE FIRST AMENDMENT'S PROTECTION.

Section 54 of the Michigan Campaign Finance Act, MCL § 169.254, J.S. App. 104a, makes it a felony, punishable by up to three years' imprisonment and a fine of up to $10,000, for any corporation (or any individual acting on its behalf) to make any expenditure—including an independent expenditure—"in assistance of, or in opposition to, the nomination or election of a candidate." J.S. App. 91a.[2]

It is beyond dispute that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates." *Mills v. Alabama,* 384 U.S. 214, 218 (1966). Thus, communications such as the one involved in this case—an independent expenditure[3] made to purchase a newspaper advertisement supporting the election of a candidate for public office—lie "at the core of the First Amendment." *Federal Election Commission v. National Conservative Political Action Committee,* 470 U.S. 840 (1985) ("*NCPAC* "); *Buckley v. Valeo,* 424 U.S. 1, 39 (1976). And it is by now well settled that expenditures made to finance such communications, which are a *sine qua non* of effective political speech "in today's mass society," *Buckley,* 424 U.S. at 19, also "are entitled to full First Amendment protections." *NCPAC,* 470 U.S. at 496; *see also Buckley,* 424 U.S. at 19-23.

This Court, therefore, has consistently struck down laws restricting the independent expenditure of money to engage in political speech. *See, e.g., Buckley,* 424 U.S. at 39-51; *NCPAC, supra; FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986) ("*MCFL*"); *Meyer v. Grant,* 108 S. Ct. 1886 (1988). Michigan law makes such activity a felony if the actor is a corporation or its agent. But, as this Court has held, the constitutional right of free speech inures to the benefit of corporations as well as individuals and unincorporated associations. *See First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *Consolidated Edison Co. v. Public Service Comm'n of New York,* 447 U.S. 530 (1980). Accordingly, the mere fact that appellee is incorporated cannot justify this restriction on its speech.

Appellants and *amicus* Common Cause recognize that Section 54(1) is a substantial limitation on protected speech, and that a demonstration of compelling governmental interests is therefore required if the statute is to be upheld. *See* Brief for Appellants at 23-34; Brief for Common Cause at 3. *Amicus* FEC, however, asserts that the statute "does not restrict the State Chamber's political speech." FEC brief at 8 (initial capitals omitted).

The gist of the FEC's argument is that the restrictions of Section 54(1) can simply be ignored because Michigan law permits a corporation to establish a "separate segregated fund" that can make certain political expenditures. *See* MCL §

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[2] There is no indication that this broad statutory prohibition is restricted to "express advocacy" as this Court has developed that concept in cases from *Buckley* through *Massachusetts Citizens for Life.* Although the proposed advertisement in this case would appear to be squarely within the concept of "express advocacy," the statute's facial overbreadth is susbstantial. *See Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569 (1987).

[3] By "independent expenditure," we mean an expenditure that is neither a contribution to, nor coordinated with, a candidate's campaign. *See* MCL § 169.209, J.S. App. 97a (defining "independent expenditure" in similar terms).

169.255, J.S. App. 106a-109a. The FEC made precisely the same argument in *Massachusetts Citizens for Life, see* 479 U.S. at 252, and the Court rejected it, recognizing that the establishment and operation of such a fund is an onerous task, *see id.* at 253-55 (plurality opinion); 266 (O'Connor, J., concurring), and that since "the avenue [for speech] it leaves open is more burdensome than the one it forecloses," *id.* at 255, that is "sufficient to characterize [the statutory scheme] as an infringement on First Amendment activities." *Id.*

Thus, the fact that the Michigan State Chamber of Commerce (the "State Chamber") already operates a separate segregated fund is of no constitutional significance. Indeed, the fact is that Massachusetts Citizens for Life, Inc., *also* had a separate segregated fund; that did not change this Court's conclusion that it was entitled to make political expenditures using corporate funds. *See MCFL,* 479 U.S. at 255 n.8. A person who has chosen to comply with an unconstitutional law does not thereby waive the right to challenge it. One might as well argue that because a taxpayer had paid a particular tax, thereby demonstrating that he could afford to do so, his protest against it should be dismissed.

If appellee has a constitutional right to engage in political speech directly, the fact that it can also do so indirectly, through its separate segregated fund, is simply irrelevant, for the Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." *Consolidated Edison v. PSC,* 447 U.S. at 541 n.10. *See also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 757 n.15 (1976) (the availability of alternative methods of communication does not justify governmental restraints on a speaker's preferred means). As a unanimous Court emphasized only last year,

"the First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant,* 108 S. Ct. 1886, 1893 (1988).

"When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest." *MCFL,* 479 U.S. at 256. Accordingly, the prohibition on corporate independent expenditures in the Michigan Campaign Finance Act, like the parallel prohibition of the Federal Election Campaign Act involved in *MCFL,* must be tested by that strict standard.

II. SECTION 54(1) SERVES NO COMPELLING GOVERNMENTAL INTEREST.

Appellants assert that the political censorship at issue here is justified by the government's interests in eliminating political corruption or the appearance thereof, and in protecting individuals against the use of their money to support causes they may oppose. *Amici* FEC and Common Cause additionally argue that Section 54(1) serves a compelling interest in protecting the integrity of the political system against the "unfair deployment of wealth." Common Cause brief at 5; *see* FEC Brief at 11-12. None of these interests are sufficiently compelling, in the context of this case, to survive the "exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley,* 424 U.S. at 44-45.

A. Eliminating Corruption or the Appearance of Corruption.

This Court "held in *Buckley* and reaffirmed in *Citizens Against Rent Control* [*v. Berkeley,* 454 U.S. 290 (1981)] that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far

identified for restricting campaign finances." *NCPAC,* 470 U.S. at 496-97. But the phrase "corruption or the appearance of corruption" is not a magic spell the mere incantation of which suffices to trump free speech rights. Rather, the burden rests squarely on the government to show that its asserted interests actually justify the censorship it wishes to impose. *See Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 777 (1986). Nothing even remotely approaching such a showing has been made here.

1. Independent Expenditures by Non-Profit Corporations Do Not Pose a Threat of Corruption.

"Corruption," the Court has explained, "is a subversion of the political process" whereby "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo:* dollars for political favors." *NCPAC,* 470 U.S. at 497.

Thus, as the Court has repeatedly explained in earlier cases, there is simply no actual or apparent "corruption" involved in making a public statement—through the purchase of newspaper space or media time—of support for or opposition to a candidate in an election campaign. Here, as in *NCPAC,* "the conduct proscribed is not contributions to the candidate, but independent expenditures," *id.,* a distinction that makes a "fundamental constitutional difference," *id.,* because they involve no *quid pro quo,* and, indeed, may be quite unappreciated by the candidate. *See id.; see also Buckley,* 424 U.S. at 47. Accordingly, the Court held in *Buckley* and reaffirmed in *NCPAC* and *MCFL,* such independent expenditures cannot be banned based on an unsupported cry of "corruption."

There is nothing in the record of this case that should cause the Court to alter its conclusion.[4]

Of course, the State Chamber is a corporation, but "associations do not suddenly present the specter of corruption merely by assuming the corporate form." *MCFL,* 479 U.S. at 263. In fact, both Massachusetts Citizens for Life, Inc., and the National Conservative Political Action Committee, Inc., were corporations. *See MCFL,* 479 U.S. at 241; *NCPAC,* 470 U.S. at 496. Like them, appellee is a non-profit, membership corporation, whose ordinary activities include promoting its members' interests through a variety of political activities. *See* J.S. App. 41a-42a.[5] There is simply no greater reason to presume that appellee's independent public expressions of support for a candidate are "corrupt" than there is to conclude that independent speech by an individual is corrupt, a presumption rejected in *Buckley;* or that independent speech by a large political action committee is corrupt, a presumption rejected in *NCPAC;* or that independent speech by a non-

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[4] Common Cause states that this interest "has never been more compelling," noting the "continuing series of scandals in the federal government [involving] the misuse of corporate money to influence government decisions, and the deleterious effects of such corruption on public confidence in our governing institutions." Common Cause Brief at 6, citing the influence-peddling now being uncovered at HUD, the "Ill Wind" investigation into procurement fraud at the Pentagon, and direct corporate gifts to Members of Congress in return for direct assistance. *Id.* at 6 n.14. The ACLU does not condone such misconduct any more than Common Cause does. We fail, however, to see what those examples—all of which involve the direct and surreptitious exchange of money for favors—have to do with the constitutionality of Section 54(1), which prohibits the public expression of political views.

[5] The fact that the Chamber of Commerce also engages in non-political activities hardly makes its political activities suspect. *See infra* note 14.

profit membership corporation, much like appellee except in size, is corrupt, a presumption rejected in *MCFL*. [6]

To be sure, the State Chamber's treasury may be larger than that of Massachusetts Citizens for Life, but NCPAC's pocket was apparently even deeper. *See* Brief for Appellant Common Cause at 33 n.53, *Common Cause v. Schmitt*, No. 88-847 (O.T. 1980) (reporting that NCPAC collected more than $7.6 million in 1979-1980 for use in the 1980 campaigns). The size of these figures, however, is irrelevant. Wealth is not synonymous with corruption. Even a small bribe is corrupt; even a large independent expenditure is not.[7]

In short, appellants assert an interest in preventing corruption or its appearance only because that is the judicially-approved route to upholding statutes that restrict political funding. But the facts of this case do not entitle appellants to proceed down that route.

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[6] *Buckley* and *NCPAC* make it clear that even large independent expenditures do not raise the specter of corruption, and cannot be prohibited on that ground. Yet the Michigan law challenged here bans independent expenditures of even small sums of money.

[7] Indeed, the size of an independent expenditure is not even a particularly good proxy for the size of a political favor. A single personal appearance by a political or entertainment celebrity may capture more votes for a candidate than a million dollars' worth of television commercials, and leave the candidate feeling more grateful for the favor. If the government has a compelling interest in eliminating grateful feelings on the part of politicians, then a ban on political endorsements by popular public figures will be the next logical step in election campaign "reform."

2. A Complete Ban on Independent Spending by Non-Profit Corporations that Receive Corporate Contributions is Not Necessary to Prevent Spending by Business Corporations.

Appellants and their *amici* also argue that, because the State Chamber has members who are business corporations, it must be prohibited from making independent expenditures in order to prevent it from acting as a "conduit" for money from such entities. *See* Brief for Appellants at 39-40, 46; FEC brief at 15; Common Cause brief at 20-24. Even assuming that such activity constitutes "corruption" and can constitutionally be prohibited,[8] it is simply not necessary to ban independent expenditures by groups such as the State Chamber in order to achieve that goal. Non-profit corporations can be required to fund their independent expenditures out of income from other sources, and to keep such records or file such reports as the government requires to demonstrate compliance with such limitations. *See MCFL*, 479 U.S. at 262 (reporting requirements of federal law "provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions").[9]

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[8] *But see infra* Part II-C-1.

[9] The Court of Appeals in this case stated that the reporting requirements of Section 51 of the Michigan law would serve this purpose. *See* J.S. App. 25a-26a. The State responds that Section 51 does not apply to corporations. Brief for Appellants at 24. Assuming the State to be correct, the constitutional solution is for Michigan to enact an appropriate reporting requirement. A State cannot impose a direct, content-based restriction on core First Amendment rights when a less restrictive alternative is available, simply because it doesn't feel like using the alternative. *See Boos v. Barry*, 108 S. Ct. 1157, 1165-68 (1988) (District of Columbia law banning demonstrations near embassies struck down in light of more narrowly drawn federal statute that adequately

Common Cause argues that because "[m]oney is fungible," such segregation of funds is meaningless. Common Cause brief at 21. However, neither Congress nor this Court shares that view, as federal legislation and judicial decisions demonstrate.

In the Internal Revenue Code, Congress has provided that non-profit, tax-exempt organizations qualified under 26 U.S.C. § 501(c)(3) (contributions to which are tax-deductible to the donor) may not engage in a substantial amount of lobbying activity, while organizations qualified under § 501(c)(4) (contributions to which are not deductible) may lobby freely. The congressional purpose is to avoid subsidizing lobbying with tax-deductible funds. *See Regan v. Taxation With Representation of Washington,* 461 U.S. 540, 544 (1983). A great many non-profit organizations (including the ACLU) consist of affiliated (c)(3) and (c)(4) corporations. All that is required is "that the two groups be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying." *Id.,* 461 U.S. at 544-45 n.6. But the (c)(3) organizations can exercise "control . . . over the lobbying of their § 501(c)(4) affiliates," and the (c)(4) organizations can engage in "lobbying explicitly on behalf of their § 501(c)(3) affiliates." *Id.* at 553 (Blackmun, J., concurring). Under Common Cause's reasoning, this careful statutory scheme is "economic nonsense," Common Cause brief at 20, because "money from one source that is used for one activity frees up money from other sources to be used for

served same interests, even though legislation would be necessary to make federal statute applicable in the District of Columbia).

other activities." *Id.* at 21. Obviously, Congress does not agree with that assessment.[10]

Nor does this Court share the view that Common Cause urges here. In a series of constitutional cases arising under the Establishment Clause of the First Amendment, the rule has been established that government financial assistance to private, religious schools for discrete, secular activities will not be considered as a subsidy for the schools' religious activities merely because "money from [the government] source that is used for one activity frees up money from other sources to be used for [religious] activities." *See Everson v. Board of Education,* 330 U.S. 1 (1947); *Board of Education v. Allen,* 392 U.S. 236 (1968); *Tilton v. Richardson,* 403 U.S. 672 (1971); *Roemer v. Board of Public Works,* 426 U.S. 736 (1976).[11] Accordingly, there is no reason to assume that any concern about the use of non-profit corporations as "conduits" for the funds of business corporations cannot be adequately addressed through bookkeeping and reporting requirements.

Moreover, to the extent that such requirements are not a foolproof guarantee against some small leakage of business funds into non-profit expenditures, the Court has already explained that direct and substantial restraints on political speech "cannot be sustained simply by invoking the interest in

[10] The ACLU, as *amicus curiae* in *Taxation With Representation,* argued that the statutory restrictions on lobbying by § 501(c)(3) organizations were unconstitutional. The Court concluded, however, that the requirements of separate incorporation and bookkeeping were "not unduly burdensome." 461 U.S. at 544-45 n.6. By contrast, the Court emphasized the extensiveness and complexity of the "separate segregated fund" restrictions involved in *MCFL,* and concluded that they *were* unduly burdensome.

[11] Whether the line has been correctly drawn under the Establishment Clause is a separate issue. But as long as it exists, the rule of segregated funds can and should be applied in this context as well.

maximizing the effectiveness" of other regulations. *Buckley,* 424 U.S. at 44. This is so because the First Amendment is not a disfavored "loophole" in an edifice of governmental regulation of speech; under our Constitution, it is the other way around: "debate on public issues should be uninhibited, robust, and wide-open," *New York Times v. Sullivan,* 376 U.S. 254, 270 (1964). It is not government censorship that must be augmented for optimal effectiveness, but "First Amendment freedoms [that] need breathing space to survive." *NAACP v. Button,* 371 U.S. 415, 433 (1963).

3. A Complete Ban on Independent Spending by Non-Profit Corporations Gives Government Too Potent a Weapon to Harass Public Issue Advocacy.

Appellants argue that the criteria identified by this Court in *MCFL* for constitutionally exempting certain non-profit corporations from statutory prohibitions on political campaign expenditures are not met in this case. *Amici* FEC and Common Cause, however, would essentially have this Court limit that decision to its special facts, thereby denying First Amendment protection to non-profit corporations that accept any contributions from business corporations.

These suggestions must be analyzed in the context of the total statutory ban on any corporate political expenditures and the frequently malleable nature of the "express advocacy" concept that defines such expenditures. In *Buckley,* this Court recognized the danger that a broad definition of "expenditure" could ensnare a wide range of vital discussion of public issues in the net of campaign finance restrictions. Accordingly, the Court ruled that regulation of independent expenditures could only attach to "communications that include explicit words of advocacy of election or defeat of a candidate." 424 U.S. at 43.

But as important as this limitation has been, it is subject to the vagaries of context and interpretation.[12]

The Federal Election Commission has persistently pressed for a broad and expansive interpretation of the "express advocacy" concept, to the point where one court chastized it for pursuing a "totally meritless" complaint over a $135 expenditure, *see Federal Election Commission v. Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45, 53 (2d Cir. 1980) (*en banc*), with a concurring opinion charging that the Commission had "failed abysmally" to show sensitivity to First Amendment rights. *Id.* at 55 (Kaufman, C.J.).

The combination of an aggressive agency view of what constitutes "express advocacy" and broad statutory prohibitions on corporate expenditures that could be so characterized puts at considerable risk the political speech of many issue-oriented organizations that take corporate form. If their public advocacy can in any way be construed by the Commission as "express advocacy"—for example, if it criticizes an incumbent President during an election year—then they risk a charge of having made an illegal expenditure under 2 U.S.C. § 441b. Indeed, in recent years such charges have been filed with the Commission against such groups as Planned Parenthood, the National Organization for Women, the Wilderness Society, the Sierra Club and the Committee for Sane Nuclear Policy. The Commission even entertained charges against the ACLU, and it took a ten-page General Counsel's Report for the Commis-

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[12] *Compare MCFL,* 479 U.S. at 248-50 (finding express advocacy) *and Federal Election Commission v. Furgatch,* 807 F.2d 857 (9th Cir. 1987) (same) *with Federal Election Commission v. Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45 (2d Cir. 1980) (*en banc*) (finding no express advocacy) *and Federal Election Commission v. National Organization for Women,* C.A. No. 87-2269 (D.D.C. 1989) (same).

sion to conclude that there was "no reason to believe" that ACLU fund-raising mailings, attacking President Reagan's record on civil liberties during a Presidential election year, constituted an illegal corporate expenditure.

For these reasons, any narrowing of *MCFL* will place issue organizations in even greater danger of being the target of enforcement proceedings on claims, however marginal, that their political speech constitutes "express advocacy." Similarly, a rule that automatically prevents non-profit corporations from qualifying for the *MCFL* exemption if they receive any contributions from business corporations would disable many advocacy organizations from invoking the *MCFL* protections, since many do receive a small portion of their contributions from business organizations. *See FEC v. N.O.W., supra.*

Thus, non-partisan issue-oriented organizations require careful protection against government harrasment of their speech: both a strict definition of the "express advocacy" concept, *and* a broad First Amendment-based rule that non-profit organizations cannot be punished for such advocacy under statutory prohibitions of corporate expenditures that were intended to apply to profit-making business corporations, not issue-oriented organizations that take the corporate form.

B. Protecting the Rights of Dissenting Members.

The second interest advanced by the State as a justification for Section 54(1) is the interest in "protect[ing] shareholders who have paid money into a corporation 'for purposes other than the support of candidates from having that money used to support candidates to whom they may be opposed.'" Brief for Appellants at 35, *quoting Federal Election Commission v. National Right to Work Committee,* 459 U.S. 197, 208 (1982). This purported interest is not truly present in this case, nor would it be compelling if it were.

1. This Court has already disapproved this alleged state interest as one that can justify governmental prohibition of corporate speech in circumstances such as those presented here. In *Bellotti, supra,* Massachusetts law prohibited business corporations from spending money to urge the passage or defeat of ballot questions. In defense of the law, the State asserted the same interest in "preventing the use of corporate resources in furtherance of views with which some shareholders may disagree" that appellants proffer here. *See* 435 U.S. at 792-93.

Assuming, *arguendo,* that such an interest could be compelling, the Court rejected the State's submission, noting that the State's asserted purpose was "belied . . . by the provisions of the statute," *id.* at 793. which were both underinclusive and overinclusive: underinclusive in that thay permitted corporations to engage in other political advocacy (such as lobbying) without regard to the displeasure of dissenting shareholders, and permitted unincorporated organizations to urge the passage or defeat of ballot questions without regard to the views of dissenting members; overinclusive in that they prohibited a corporation from engaging in such speech even if the shareholders had unanimously authorized it. *Id.* at 793-95.

The circumstances here are preciseiy the same. The State's purported purpose is belied by its own law, which permits corporations to engage in other forms of political speech, including lobbying on controversial proposed legislation and public advocacy for or against ballot questions, "though the displeasure of disapproving shareholders is unlikely to be any less." *Bellotti,* 435 U.S. at 793. Similarly, the restriction does not apply to unincorporated "entities or organized groups in which numbers of persons may hold an interest or membership," even though "[m]inorities in such groups or entities may have interests with respect to institutional

speech quite comparable to those of minority shareholders in a corporation." *Id.* Finally, Michigan law is identically overinclusive, prohibiting the specified communications "even if its shareholders [or members] unanimously authorized the . . . expenditure." *Id.* at 794. Moreover, appellants have produced no evidence indicating that the protection of shareholders' rights was, in fact, a purpose of the Michigan Campaign Finance Act. *See Mississippi University for Women v. Hogan,* 458 U.S. 718, 730 (1982) (State's asserted justification for constitutionally-suspect legislation rejected in part because it "failed to establish that the alleged objective is the actual purpose" of the law).

Thus, whatever force this asserted interest might have in a proper case, it is clear that it is not in fact an interest that Michigan views as compelling in the context of election finance regulation.

2. Nor is there any reason to believe that the members of the State Chamber joined that organization or pay their dues in ignorance of, or in disagreement with, its activities or its political orientation as an advocate for the interests of the business community.[13] While there may be other benefits of

[13] Both Common Cause and the FEC insist that the State Chamber is wholly unlike MCFL because MCFL is an ideological organization, while "the Chamber was established by business corporations to promote their economic interests." Common Cause brief at 12; *see also* FEC brief at 16. But a great deal of political debate involves the economic interests of various groups. When the Grange lobbies for crop supports, the AFL-CIO campaigns for an increase in the minimum wage, the AARP works for catastrophic health insurance for the elderly, the VFW pushes for an extension of the GI Bill, or the CCNV demonstrates for low-income housing, they are engaging in political activity to advance the economic, as well as the ideological, interests of their members. This does not render their advocacy any less than fully protected by the First Amendment. *See, e.g., Meyer v. Grant, supra,* 108 S. Ct. at 1894

membership, such as the ability to purchase group insurance or to receive Chamber publications at discount rates, *see* Common Cause brief at 13-14; FEC brief at 13-14,[14] this is hardly a situation where Michigan businesswomen and men have little choice but to belong to the Chamber of Commerce regardless of their sympathy with its politics.[15] Thus, like the

(political activity by Coloradans for Free Enterprise, Inc., to repeal state regulation of the trucking industry is at the "zenith" of First Amendment freedoms); *Eastern RR Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 139 (1961) ("A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would . . . deprive the people of their right to petition in the very instances in which that right may be of the most importance to them"); *Thomas v. Collins,* 323 U.S. 516, 540 (1945) (the First Amendment protects "he who seeks to rally support for any social, business, religious or political cause"). This is a free speech case, not an economic substantive due process case. Business interests are not seeking to avoid government regulation of their business; they are resisting government censorship of their speech.

[14] There are probably few major membership organizations that engage in political advocacy and do not also provide some valuable benefits to members, including the ACLU. For example, the Sierra Club organizes wilderness excursions for its members, offers a variety of camping and outdoor equipment and publications for sale at a discount to members, and publishes a monthly membership magazine. The American Automobile Association provides its members with emergency road service, maps and vacation planning services, and group insurance, and also engages in political speech on behalf of the interests of motorists, as the AAA views those interests.

[15] Appellee has approximately 8,000 members, of which more than 6,000 are corporations. J.S. App. 41a. There are over 3,277,000 active corporations in the United States. *See* U.S. Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES: 1989, at 516 (Table 846) (1985 data). If only 2% of them operate in Michigan (presumably a very low estimate), then fewer than 10% of Michigan businesses are members of the State Chamber of Commerce.

resources available to MCFL, the resources available to the State Chamber "are not a function of its success in the economic marketplace, but its popularity in the political marketplace." *MCFL*, 479 U.S. at 259.

In reality, "[i]t is unduly stretching language to say that the members or stockholders are unwilling participants in such normal organizational activities, including the advocacy . . . of governmental policies affecting their interests, and the support thereby of candidates thought to be favorable to their interests." *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 123 (1948). Members who disagree frequently enough, or strongly enough, with the views expressed by an organization to which they voluntarily belong, or by a corporation in which they own stock, can always quit or sell their stock, and frequently do.[16]

3. Even if a State legislated unambiguously in furtherance of this interest, however, and even if there were a significant number of dissenting members or shareholders, it would seriously threaten basic constitutional values to allow the government to override a private, voluntary organization's right of free expression. It is, for example, no secret that with respect to virtually every issue on which the ACLU expresses a public position, some of its members disagree, often strongly.[17] By

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16 Of course, different principles apply when membership in, or payments to, an organization are legally or practically compulsory. *Compare, e.g., Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *with Bellotti*, 435 U.S. at 794 n.34 (noting this "critical distinction").

17 "Most of our decisions are made by a board of directors by a vote of 42 to 36, with 12 abstentions, and three motions to reconsider. I would be surprised if there was a single member of the ACLU that didn't disagree with 10 or 12 things that we do—and that includes me." Ira Glasser (Executive Director, ACLU), *Presidential Politics and the ACLU*, speech at the National Press Club, Washington, D.C. (Oct. 6, 1988).

the same token, some members of Common Cause no doubt disagree with some of the views that it has expended their dues to express.[18] Some shareholders of the Mobil Corporation surely disagree with the views it has expressed in its series of newspaper commentaries, and some shareholders of Texaco Inc. probably can't stomach the Metropolitan Opera. Endorsements of candidates occupy no special position with respect to engendering shareholder or membership dissent. If the government could, by asserting a "compelling interest in protecting minority rights," silence the voices of private, voluntary organizations whenever a minority of the organization's members disagreed with the majority's decision, the First Amendment would be seriously diluted.

C. Avoiding the "Unfair Deployment of Wealth" and Protecting the "Integrity of the Political Process."

1. Appellants and their *amici* play their basic theme in close harmony: that it is "unfair," Brief for Appellants at 41; Common Cause brief at 2, and "corrosive," FEC brief at 12, for "concentrated corporate wealth," *id.*, "amassed through the corporate form," Common Cause brief at 2, in "the economic marketplace," Brief for Appellants at 41, to be allowed into election campaigns.

Of course these arguments, however valid they may be with respect to business corporations, have nothing to do with the activities of non-profit membership corporations such as the State Chamber. And when they are subjected to the "close

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18 Many people are members of both the ACLU and Common Cause, and cannot possibly agree with their divergent positions on the controversial political issue of election campaign finance regulation.

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examination of [their] underlying rationale" that the First Amendment requires, *MCFL,* 479 U.S. at 257, it is not at all clear why independent expenditures even by business corporations are constitutionally different from expenditures by so-called "ideological" corporations, unincorporated associations and individuals, all of which have been protected.

The argument appears to rest on two interrelated grounds: that corporate funds are different because they are "'amassed by the special advantages which go with the corporate form of organization,'" Brief for Appellants at 42, *quoting MCFL,* 479 U.S. at 257, and that corporate funds are different because corporations earn their money through the sale of goods and services, rather than receiving voluntary political contributions, *see* FEC brief at 13; Common Cause brief at 6. Upon examination, however, neither ground persuasively distinguishes the funds earned by a corporation from those earned by others.

With respect to the first ground, it is exceedingly difficult to identify the special advantages of corporate form that are thought to be relevant, or to learn why or how they are thought to be relevant, to the asserted distinction. In *MCFL,* the Court noted this theory, 479 U.S. at 257, without specifying the relevant advantages or explaining their significance, but citing to *National Right to Work Committee, supra,* 459 U.S. at 207. That case, in turn, noted the concern about the "special advantages which go with the corporate form of organization," *id., citing United States v. Automobile Workers,* 352 U.S. 567, 579 (1957), but again did not specify what these advantages were or indicate why money earned by corporations was different from money earned by partnerships, proprietorships or individuals. The *NRWC* Court did, however, identify the underlying governmental interest in regulating the political use of corporate money: it was the interest in preventing

"corruption threatened by large financial *contributions.*" *Id.* at 208 (emphasis added). The *Automobile Workers* case contains no discussion of any special advantages of corporate form at the cited page; indeed the case, and the discussion at that page, involved congressional concern with large contributions made by powerful labor unions. The trail ends there.

It is, of course, true that corporations have some advantages compared to other forms of organization, for example, they are subject to "special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets." *Bellotti,* 435 U.S. at 809 (White, J., dissenting). But the majority in *Bellotti* viewed these differences as irrelevant to a corporation's right to engage in free speech with respect to ballot issues, and no reason has been suggested here why they are any more relevant with respect to speech about candidates.[19]

The second prong of appellants' argument is that it is "unfair" for "resources amassed in the economic marketplace" to be used "in the political marketplace" because these resources reflect "the economically motivated decisions of investors and customers" rather than "popular support for the corporation's political ideas." *MCFL* at 258. But except for funds raised by explicitly political organizations such as MCFL and NCPAC, virtually *all* money "amassed" in the

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[19] It is worth noting that other forms of organization have special advantages of their own: tax exemption, for example. And some partnerships or unincorporated associations have existed far longer than most corporations and have accumulated far greater assets than most corporations—Lloyd's of London, for example, has been in unincorporated existence since the early 18th Century, *see* Webster's Deluxe Unabridged Dictionary 1059 (2d ed., 1979), and some law partnerships have continued for several generations. Likewise, the National Collegiate Athletic Association, a large and well-financed organization, is an unincorporated association. *See NCAA v. Tarkanian,* 109 S. Ct. 454, 455 (1988).

United States is earned in the "economic marketplace" and reflects something other than popular support for the "amasser's" political views. An individual who is wealthy because he made a better mousetrap cannot constitutionally be prohibited from spending it on political speech, even if he is a Socialist and most rodent-hunters are Republicans. Why, then, should the owners of Better Mousetrap, Inc., be prohibited from doing so?

Indeed, the Court has acknowledged that there is nothing special about corporations in this regard, except that they are "the most prominent example" of wealthy entities. *MCFL*, 479 U.S. at 258 n.11. In other words, legislatures have chosen to restrict the political speech of corporations "because that's where the money is," or so they think.[20] But that is surely not the kind of narrow tailoring required of laws that directly restrict core political speech, for "the desire for a bright-line rule . . . hardly constitutes the *compelling* state

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20 In actuality, singling out corporations for regulation on this basis is not even particularly accurate. Some corporations have lots of money, but most have very little. *See* U.S. Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES: 1989 at 516 (Table 847) (over 700,000 corporations with gross receipts of less than $25,000) (1985 data). At the same time, some unincorporated associations are quite wealthy, *see, e.g.,* Brief for Appellant Common Cause at 33 n.53, *Common Cause v. Schmitt,* No. 88-847 (O.T. 1980) (reporting that NCPAC collected more than $7.6 million in 1979-1980 for use in the 1980 campaigns), as are some partnerships, some sole proprietorships, and some individuals, *see* STATISTICAL ABSTRACT OF THE UNITED STATES: 1989 at 516 (Table 847) (nearly 480,000 partnerships and 1,200,000 non-farm proprietorships with receipts greater than $100,000 in 1985); *see also The Am Law 100,* The American Lawyer, July/August 1989, special insert at 10 (reporting 100 law firms—most of which are unincorporated— with gross revenues of more than $52 million per year; the first-ranked firm had over $440 million in revenues in 1988).

interest necessary to justify any infringement on First Amendment freedom." *Id.* at 263 (emphasis in original). Nor, under *Buckley* and *NCPAC,* can there be a compelling governmental interest in the prohibition of independent expenditures by any person whose speech is protected by the First Amendment.

The Court has already held that affluent candidates, political action committees, and individuals cannot be precluded from using their wealth to attempt to influence the outcome of elections through public speech, because there is simply "nothing invidious, improper, or unhealthy in permitting such funds to be spent" in political debate. *Buckley,* 424 U.S. at 56. To the contrary, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 48-49. And as shown above, there is nothing about the sources of corporate money that makes its expenditure any less "healthy."

2. Even on its own terms, the prohibition of corporate expenditures is unworkable and senseless. The clearest example of why this is so is the universally-recognized necessity of exempting the press from such restrictions. For example, Section 6(3)(d) of the Michigan Campaign Finance Act exempts from the prohibition against corporate expenditures any "expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or in opposition to a candidate . . . ." MCL 169.206(3)(d), J.S. App. 92a-93a.

Newspapers, magazines and other media are generally owned by corporations, yet the First Amendment plainly will not tolerate a law prohibiting the expenditure of corporate funds by the Washington Post Company or the New York Times Company to endorse or oppose a candidate for public office. As the Court observed in *Mills v. Alabama,* 384 U.S.

214, 219 (1966), "[i]t is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." But if it is impermissible to prohibit Booth Newspapers, Inc. (the corporate publisher of the Grand Rapids Press) from spending its money to publish an editorial endorsing Dan Quayle on page 16, how can it properly be made a crime for the Michigan State Chamber of Commerce—or the Grand Rapids Furniture Company—to spend its money to buy space on page 17 endorsing Jesse Jackson?

The answer cannot be that one company is in the business of communicating and the other is not. Nearly all corporations communicate with the public. The Mobil Corporation, for example, has been running a series of paid editorial columns in newspapers for years. Nor are the media always owned by corporations whose major business is communicative: NBC, for example, is owned by the General Electric Co. And is a newspaper that operates at a substantial deficit, subsidized by a sister corporation that manufactures widgets, to be prohibited from publishing campaign editorials because the "real" expenditure is by the widget company? For that matter, even a profitable newspaper derives much of its income from the sale of advertising in the "economic marketplace," not from contributions from ideological supporters.

It was in part, perhaps, unanswerable questions like these that led a majority of the Court to conclude, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), that "the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." *Id.* at 784 (dissenting opinion of Brennan, J., joined by Marshall, Blackmun and Stevens, JJ.); 773 (White, J., concurring in judgment) ("the First Amendment gives no more protection to the press . . . than it does to others exercising their freedom of speech").

In the District Court, appellee challenged the Michigan statute's exemption for media corporations as a denial of equal protection. That court, properly doubting that it could distinguish between media corporations and others, interpreted Section 6(3)(d) to make "no distinction between media and non-media corporations," and ruled that "Any corporation . . . may avail itself of the exemption." J.S. App. 73a. Under that interpretation, the State Chamber was apparently free, under the Michigan statute, to spend corporate funds to have ten thousand copies of its proposed advertisement printed as a handbill and distributed around town—a classic exercise of freedom of the press, *see Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("[t]he liberty of the press . . . necessarily embraces pamphlets and leaflets").

What possible legitimate state interest can it serve to permit that activity but prohibit the same entity from paying to have the same message published as an advertisement in the newspaper? Or, in an election in which a major issue dividing the candidates is free trade *vs.* protectionist tarriffs, what sense can it make to permit a corporation to publish an advertisement explaining why it is important to encourage free trade, but send its CEO to jail if the advertisement also identifies which candidate favors free trade or which favors high tarriffs? After all, the "[a]dvocacy of the election or defeat of candidates for [public] office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation," *Buckley*, 424 U.S. at 48—in both of which activities corporations have a constitutionally-protected right to engage.

Likewise, a regulatory scheme permitting corporations to speak freely on the "issues" but criminalizing any speech endorsing or opposing candidates draws such an indiscernable line that it must inevitably result either in self-censorship by

corporations anxious to stay out of jail, or the prosecution of companies engaged in protected speech, or both.

Even appellees' bright-line rule against independent expenditures by non-profit corporations that receive funds from business firms cannot resolve these difficulties, which illuminate the profound inadequacy of the government's regulatory approach to political speech. The only approach that avoids the sorts of arbitrary and discriminatory line-drawing noted above is to draw the bright line in the other direction: declaring that freedom of speech extends to corporations in this area as in others.

3. Moreover, there are positive features of corporate independent expenditures that, like the one proposed here, take the form of direct, open and public expression of political opinion and preference. Appellants and their *amici* dwell on the various ways in which corporations are allowed to use their funds for political activity: subsidizing the operation of separate segregated funds, lobbying, debating public issues, and the like, *see* Brief for Appellants at 49-56; Common Cause brief at 9-10, and conclude that corporations already have "enough" political speech alloted them and do not need the additional right to make independent political expenditures.

We draw a different conclusion: since there is already such significant corporate-generated expressive activity, what is the incremental harm in interpreting the First Amendment to permit independent political expenditures as well? Indeed, a paid editorial advertisement in a local newspaper, openly sponsored by particular corporation, is not only political speech of the purest kind, but, unlike some of the less visible sorts of corporate expenditures that are already allowed, it can be assessed by the public at face value. As the Court recently and unanimously observed: "the people in our democracy are entrusted with the responsibility for judging and evaluating the

relative merits of conflicting arguments. . . . The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech." *Meyer v. Grant,* 108 S. Ct. at 1894 n.7 (internal quotations and citations omitted).

4. Finally and even more basically, the attempt to keep money out of politics is both futile and dangerous. Common Cause correctly observes that "[m]oney is fungible." Common Cause brief at 21. But that is only half the story. Money is also the universal medium of exchange, and in a society in which communication and advocacy can be carried out in an infinitude of ways, it is, ultimately, simply not possible to prevent those who have money and care about politics from using their resources in the political world. If you are rich enough, you can buy (or establish) a newspaper.

This is not to say that some uses of money cannot be effectively prevented—bribery, for example, or other direct *quid pro quo* arrangements. But the attempt to sweep money utterly out of politics will not only fail, but will result in ever-greater restrictions on First Amendment freedoms while pushing money into new and perhaps even less desirable channels.

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This Court has never upheld a direct restriction on the independent expenditure of funds used to create political speech. It has emphasized, rather, that "legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Meyer v. Grant,* 108 S. Ct. at 1895, *quoting Buckley v. Valeo,* 424 U.S. at 50. Here, Michigan has made such conduct a criminal offense for corporations and their agents. "The burden that [it] must overcome to justify this criminal law is well-

nigh insurmountable." *Id.* at 1894. It has not been surmounted here.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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